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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 422

OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 11, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 261–265) is reported at 235 F. 2d 832. The decision and order of the Board is reported at 113 NLRB 987 (R. 229a–247a).

JURISDICTION

The judgment of the court below (R. 261–265) was entered on June 21, 1956. The petition for a writ of certiorari was filed on September 14, 1956, and was granted on November 13, 1956. (352 U. S. 906.) The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board must assert jurisdiction over labor organizations acting as employers.

2. Assuming a negative answer to Question 1, whether the Board, for purposes of exercising its jurisdiction, may apply to labor organizations, acting as employers in the course of their normal union functions, the administrative standards which the Board has adopted for other nonprofit employers.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the appendix, *infra*, pp. 43–44.

STATEMENT

I. THE BOARD'S FINDINGS AND CONCLUSIONS RESULTING IN DISMISSAL OF THE COMPLAINT

A. PRELIMINARY STATEMENT[2]

This case arose out of the competitive attempts of two labor organizations, both formerly affiliated with the American Federation of Labor and now both affiliated with the American Federation of Labor-Congress of Industrial Organizations, to represent the employees of one of them. Petitioner, one of those labor organizations, was seeking to represent some 23 office-clerical employees in the Teamsters Building

[1] As set forth *infra*, pp. 15–16, the Court might conclude, in view of the posture of this case when decided by the Board, that the questions raised are not ripe for review.

[2] Since the subsidiary findings of fact are not in dispute, record references herein are to the findings set forth in the Board's decision and in the trial examiner's intermediate report.

in Portland, Oregon, employed by various locals, agents, and instrumentalities of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The International and these various entities and their agents are collectively referred to herein as the Teamster organizations (R. 99a).[3] Upon charges filed by petitioner, the General Counsel of the Board issued complaints alleging that the Teamster organizations, acting in their capacity as employers of these office-clerical employees, had engaged in unfair labor practices in violation of Section 8 (a) (1), (2), (3), (4) and (5) of the Act (R. 81a–84). Following a hearing on these consolidated cases, a trial examiner of the Board issued his intermediate report finding that the Teamster organizations were employers within the meaning of the Act, that they were engaged in commerce, that it would effectuate the policies of the Act to assert jurisdiction over them, and that they had engaged in unfair labor practices in some of the respects alleged in the complaints (R. 89a–188a). The Board, with two members dissenting, dismissed the complaints without considering the merits of the charges (R. 229a–247a).

The pertinent facts relative to the nature and operations of the Teamster organizations are not in dispute. They are set forth in detail in the trial examiner's intermediate report (R. 85a–93a) and are briefly summarized below.

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[3] The Teamster organizations, in addition to the International and its agent, John J. Sweeney, consist of Joint Council of Drivers No. 37; Locals 206 and 223, affiliated with the International; Teamsters Building Association, Inc.; and Oregon Teamsters' Security Plan Office (also known as Teamsters Security Administration Fund), and its administrator, William C. Earhart.

B. NATURE AND OPERATIONS OF THE TEAMSTER ORGANIZATIONS AS EMPLOYERS

1. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* herein called the International, is a national labor organization having 872 chartered locals in the United States, Alaska, Hawaii, Canada and the Canal Zone, including two involved in this proceeding (R. 85a–86a). The annual flow of initiation fees and per capita taxes from its constituent locals all over the country, including these in the State of Oregon, to its national headquarters in Washington, D. C., is over $6,000,000 (R. 86a). The International has desk or office space in the Teamsters Building in Portland, Oregon, where the employees here involved worked. Through its control of the locals, as described fully in the intermediate report (R. 90a–93a), it was in a position to exercise control, at least indirectly, over the office-clerical employees and to interfere with their organizational rights. The complaint alleged that it did so through its general organizer, John J. Sweeney (R. 52a–53a).

2. *Local 206* is affiliated with the International. During the year ending June 30, 1954, it collected $156,839 in dues, reinstatement and application fees and fines from its members in Oregon and remitted to the International per capita taxes in the amount of $46,786 (R. 86a). It employs two of the office-clerical employees working in the Teamsters Building (R. 162a).

3. *Local 223,* also affiliated with the International, has no constitution or by-laws of its own but operates

under the International's constitution (R. 90a). During the year ending June 30, 1954, it collected $32,468 in dues, reinstatement and application fees and fines from its members in Oregon and remitted to the International per capita taxes in the amount of $7,258 (R. 86a). It shares an office employee with three other locals having their offices in the Teamsters Building (R. 163a).

4. *Joint Council of Drivers, No. 37* is comprised of 23 Teamster locals, 21 in the State of Oregon and two in the State of Washington. It was established pursuant to, and operates under, the constitution of the International. Its income consists of per capita taxes paid by its constituent locals, and for the year ending June 30, 1954, it received $177,645 from this source, $8,609 of which came from locals outside the State of Oregon (R. 86a). The Joint Council employs several of the office-clerical employees who work in the Teamsters Building (R. 130a).

5. *Teamsters Building Association, Inc.,* is a nonprofit Oregon corporation in which the stock is fully owned by six Teamster locals, including Local 206. Its only function is to own and operate the Teamsters Building in Portland, which is entirely occupied by Teamster organizations, including those here involved (R. 86a–87a, 231a). So far as the record shows, the corporation's purchases and income are entirely intrastate (R. 87a). It employs one full-time employee, a telephone operator on the building switchboard, and a part-time bookkeeper who is also employed by the Joint Council (R. 112a, 129–130a).

6. *Oregon Teamsters' Security Plan Office,* also known as *Teamsters Security Administration Fund,* and herein called the Security Plan Office, is an organization consisting, at the time of the hearing in this case, of an administrator, William C. Earhart (one of the respondents before the Board), and a staff of office and clerical employees (R. 89a, 203a–231a). With the aid of this staff, Earhart administers 18 trust funds established by collective bargaining agreements between various Teamster locals comprising the Joint Council and some 2000 employers. These employers are located primarily in Oregon, though a few of them are in Washington, Idaho, and Montana. The administrator is appointed by the trustees, half of whom are designated by the Teamster locals and the others by the interested employers. With contributions furnished by the employers, the administrator purchases health and welfare insurance policies from an insurance company in California for the employee-beneficiaries of the trusts (R. 87a–88a, 231a). The premiums remitted by the administrator to the insurance company in California are in excess of $2,000,000 a year. The insurance company, in turn, remits four percent of the amount of these premiums back to the Security Plan Office in Portland, Oregon, for the purpose of defraying office expenses and processing and paying claims under the health and welfare plans (R. 88a). During the period pertinent here, Security Plan Office employed five to ten of the Teamster Building office personnel (R. 101a).

C. CONCLUSIONS OF THE TRIAL EXAMINER

The trial examiner concluded, on the basis of the above facts, that each of the Teamster organizations was an employer within the meaning of Section 2 (2) of the Act in relation to its own employees (R. 85a–86a). He found that all of the organizations were engaged in commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction over them. He treated all of the organizations, except Security Plan Office, as integral parts of a multi-state enterprise consisting of the International and all of its locals and their constituent entities (R. 94a–97a). He found that the annual outflow of initiation fees and per capita taxes from its affiliates to the International's headquarters in Washington, D. C. (over $6,000,000) was more than sufficient to meet the Board's applicable minimum requirement ($250,000) for asserting jurisdiction over non-retail multi-state enterprises, as established by the Board in *Jonesboro Grain Drying Cooperative,* 110 NLRB 481 (R. 89a–97a). In asserting jurisdiction over the Security Plan Office, the trial examiner relied upon the fact that it remitted to an insurance company in California insurance policy premiums in excess of $2,000,000 annually, an amount more than sufficient to meet the minimum outflow requirement applicable under the Board's standards for industrial enterprises ($50,000) as set forth in the *Joneboro* decision (R. 97a–98a).

D. CONCLUSION OF THE BOARD MEMBERS RESULTING IN DISMISSAL OF THE COMPLAINTS

Four of the five Board members agreed with the trial examiner that each of the Teamsters organizations was an employer within the meaning of Section 2 (2) of the Act (R. 231a–232a, 242a–243a). They divided two–two, however, on the question whether it would effectuate the policies of the Act to assert jurisdiction over these employers. The fifth Board member, Mr. Murdock, was of the view that the Teamster organizations were not employers within the meaning of Section 2 (2) of the Act, and for this reason he joined with Chairman Farmer and Member Peterson—the two who voted to decline jurisdiction for policy reasons—in dismissing the complaints.

We set forth below the bases for the three opinions of the Board members:

1. *The Farmer-Peterson opinion*—Chairman Farmer and Member Peterson held that "the mere inclusion of labor unions in the statutory definition of 'employer' does not constitute a legislative ukase that, in all instances, their operations affect commerce and that assertion of the Board's jurisdiction over unions will effectuate the policies of the Act" (R. 233a). In their view, "the limited inclusion of labor organizations in the Act's definition of an 'employer' [is] consistent with the undisputed legislative intent to empower the Board to decide, pursuant to appropriate jurisdictional standards, whether to assert jurisdiction over particular employers, thus leaving the Board free to determine whether the operations

of a union-employer, like any other employer, affect commerce within the meaning of the Statute, and, if so, whether Board assertion of its jurisdiction over such operations will effectuate the policies of the Act" (*ibid.*).

In finding that it would not effectuate the policies of the Act to assert jurisdiction in this case, they applied the standards which the Board had theretofore established for nonprofit organizations. They noted that all of the Teamster organizations are nonprofit organizations (R. 233a). Each exists and operates for the benefit of members of the Teamster unions and other employees in bargaining units which the Teamsters represent. The basic aim of the International, the Joint Council and the locals is to improve the working conditions of the workers, increase their job security and otherwise promote their general welfare. The Security Plan Office is a fiduciary engaged essentially in administering trust funds established by collective bargaining agreements with various employers, a typical labor union function related to employee welfare. The other Teamster organization, the Building Association, is only an instrumentality of six Teamster locals, none of which participates in any commercial transactions (R. 233a–234a).

The Farmer-Peterson opinion pointed out further that, with legislative approval, the Board asserts jurisdiction over other nonprofit employers "only in exceptional circumstances and in connection with purely commercial activities of such organizations"

(R. 234a).[4] It stated that the Teamster organizations' activities "directed to advancement of employee interests are, obviously, not substantial engagement in a commercial venture within the contemplation of the Board's jurisdictional principles for nonprofit employers" (R. 234a). Applying the jurisdictional criteria which the Board had theretofore been applying to other nonprofit employers, these Board members accordingly declined to assert jurisdiction over the Teamster organizations (R. 235a).

2. *The Leedom-Rodgers opinion*—Two other Board members, Leedom (now Chairman) and Rodgers, in a dissenting opinion, stated that they would affirm the trial examiner and assert jurisdiction over all of the Teamster organizations (R. 246a). They stated also that, even applying the nonprofit, noncommercial test relied on by the Farmer-Peterson opinion, they would, at the least, assert jurisdiction over Security Plan Office, on the grounds that it "performs functions ordinarily associated with insurance brokers and underwriters" and that the Board asserts jurisdiction over fraternal insurance operations (R. 239a-247a).

3. *The Murdock opinion*—Board Member Murdock was of the opinion that Congress did not intend to treat labor organizations as employers, for purposes of the Section 8 (a) provisions of the Act,

[4] House Conference Report No. 510, 80th Cong., 1st Sess., p. 32 (1947) (1 Leg. Hist. (1947) 536). "Leg. Hits. (1947)" refers to the two-volume collection of the legislative history of the Taft-Hartley Act, entitled "Legislative History of the Labor-Management Relations Act, 1947." The two similar volumes for the original Wagner Act are referred to as "Leg. Hist. (1935)."

when they are engaged, as in this case, solely in performing their functions as labor organizations (R. 236a–238a). Accordingly, he concurred in the dismissal of the complaints.

II. THE OPINION OF THE COURT BELOW

The court below, with Judge Bazelon dissenting, sustained the Board's dismissal of the complaints. It rejected petitioner's contention that Section 2 (2) of the Act—providing, in pertinent part, that "The term 'employer' * * * shall not include * * * any labor organization (other than when acting as an employer)"—required the Board to exercise its plenary jurisdiction over labor organizations acting as employers. It agreed with the Board "that Section 2 (2) of the Act placed labor organizations in precisely the same status under the Act as are all other employers," and concluded that, for purposes of the Board's discretionary exercise of its legal jurisdiction, Congress "put labor organizations in the category of employers as to their own employees, but it did no more than that" (R. 263–264).

The court below held further: "The conclusions of the Board with reference to the nonprofit character of these labor organizations, the reasoning with which it supported its criteria for asserting jurisdiction and the applicability of those criteria to the Teamsters are rational. We cannot say they are arbitrary or capricious." Accordingly, it ruled that the action of the Board "fell within the broad discretion which seems to be established as applicable to the Board's action in entertaining complaints" (R. 263, 264).

Judge Bazelon, dissenting, stated that "Section 2 (2)'s strikingly particular reference to labor unions sharply differentiates them from non-profit organizations generally and subjects them to the jurisdiction of the Act in respect to their own employees. Hence I think the Board erred in applying standards governing non-profit organizations generally as a basis for refusing to assert jurisdiction" (R. 265).

SUMMARY OF ARGUMENT

For the reasons stated in point I, we agree with petitioner's assumption that the Board has jurisdiction over labor unions acting as employers. We brief the issues raised by petitioner—whether the Board may decline to assert such jurisdiction and, if so, whether there was rational basis for doing so here—on the assumption that these issues may be reached. We point out, however, that the Court may deem it inappropriate to reach them since the Board's decision to dismiss the employees' complaints in this case resulted from a coalition of three members (a bare majority), one of whom thought that the Board lacked power and two of whom believed that jurisdiction existed but should not be asserted as a matter of policy.

I. A labor union, viewed in relation to its own employees, is an employer under Section 2 (2) of the Act and subject, as such, to the Board's jurisdiction. Neither the section itself nor its legislative history supports the view that Congress meant to include labor organizations within the definition of employer only when they are engaging in a commercial enterprise.

Section 2 (2), insofar as it refers to labor organizations, is identical with the same section of the Wagner Act and the corresponding provision of the proposed final version of the 1934 Wagner bill, S. 2926. And the 1934 Senate Labor Committee Report, in explaining the insertion of the parenthetical words "other than when acting as an employer," expressly referred to "clerks, secretaries, and the like" as examples of employees typically hired by labor unions. The Committee further stated that "[i]n its relation with its own employees, a labor organization ought to be treated as an employer and the bill so provides" (1 Leg. Hist. (1935) 1102).

H. The Act does not, however, require the Board to assert its jurisdiction over labor organizations acting as employers. The Board is vested with exclusive primary jurisdiction to protect the public rights which the Act creates and to give effect to the declared public policy of the statute. To that end, it is "empowered," not directed, to issue complaints and also "empowered," but not directed, to prevent any person from engaging in proscribed unfair labor practices. Section 10, *infra*, p. 43. As this Court has recognized, "unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647–648. Thus, it has been the position of the Board that it should not seek to exercise its jurisdiction to the fullest extent possible, and that it may best perform its functions by limiting itself to those

cases in which the actual or potential impact upon commerce is pronounced.

Section 2 (2) of the Act does not qualify the Board's permissive authority under Section 10 nor require the Board to exercise its jurisdiction over labor organizations when they act as employers. The section merely defines the term "employer" as used in the Act, and there is no basis either in the statutory language or its legislative history for concluding that, for purposes of the Board's assertion of jurisdiction, labor organizations as employers are to be treated differently from other employers.

III. The Board, in the exercise of its discretion, may apply to labor organizations, acting as employers in the performance of their traditional functions, the same administrative standards for assertion of jurisdiction which it applies to other nonprofit, noncommercial enterprises. With congressional approval, the Board has followed a policy of declining jurisdiction over nonprofit organizations which are not substantially engaged in activities considered commercial in the generally accepted sense, even though the business of such organizations affects commerce sufficiently to satisfy the requirements of the Act. The application of this policy to the labor organizations in this case is neither arbitrary nor unreasonable. None of these organizations is engaged in a business or conducts a commercial enterprise in the ordinary sense; the basic purpose of each is to provide benefits for their members and to advance the cause of employees generally. In these circumstances, the Board may appropriately treat them, for jurisdictional pur-

poses, as it treats other nonprofit, noncommercial employers.

ARGUMENT

INTRODUCTION

Petitioner's brief develops two main theses. The first is that the Board has no discretion to refrain from exercising its jurisdiction over labor organizations acting as employers. The second is that the Board, in this case, has abused any discretion which it may have. Both of these arguments proceed, of course, upon the supposition that the Board has jurisdiction or power over a labor union acting in the capacity of an employer. We agree with petitioner (as we did in the court below) that this threshold assumption is a valid one. Nonetheless, we deem it appropriate to brief this point (point I, *infra*), since it is a jurisdictional one and basic to the entire controversy. We also note that one member of the Board, Member Murdock, was of the view that a labor-union employer is subject to the Act only when it is engaged in nonunion functions.

There is a second preliminary consideration. As noted above, the four members of the Board who assumed that the Board had jurisdiction were divided on the question whether jurisdiction should be asserted as a matter of policy. The complaints were dismissed because Member Murdock, who thought that the Board lacked power, joined with the two members (Chairman Farmer and Member Peterson)[5] who were not disposed to assert a jurisdiction which they be-

[5] Neither Mr. Farmer nor Mr. Peterson is currently a member of the Board.

lieved to exist. The result is that four members divided on a question which they deemed to be one of discretion, and that the decisive vote was cast by a member who did not address himself to the matter of discretion because he was of the view that there was no room for its exercise. If the Court should conclude that the Board has power over labor unions acting as employers, it might also decide that the appropriate course would be to remand this case to the Board without consideration of the issues briefed by petitioner. It might decide, in other words, that the Court need not consider whether the Board may properly decline, in a particular case, to assert its jurisdiction over a labor-union employer unless and until a majority of the Board, proceeding from a correct and common premise, decides to decline. If this Court should hold that the Board has jurisdiction (which both petitioner and the Government believe to be the case) and should remand to the Board, it cannot be predicted that the Board would decline to assert jurisdiction.[6]

While we recognize that, for the reasons just stated, the Court may not reach the points argued by petitioner, we do state, under points II and III *infra*, our answers to these contentions.

[6] Only two members of the Board, as now constituted, have passed upon the policy question.

I

A LABOR UNION, VIEWED IN RELATION TO ITS OWN EMPLOYEES, IS AN EMPLOYER UNDER THE ACT AND SUBJECT AS SUCH TO THE BOARD'S JURISDICTION

Section 2 (2) of the Act provides in relevant part that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." For purposes of determining whether labor organizations are employers, this language, on its face, provides no basis for distinguishing between a labor union performing its normal union functions and one engaged in some non-union or commercial activity.[7]

Moreover, in our view, the legislative history of the section will not warrant such a distinction. Section 2 (2) of the present Act, insofar as it refers to labor organizations, is identical with the same section of the Wagner Act and with the corresponding provision of the proposed final version of the original 1934 Wagner Bill, S. 2926.[8] In the first version of the 1934 bill, labor organizations were specifically excluded from the definition of employer.[9] In the hearings on that bill before the Senate Committee on Education and Labor,

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[7] As stated above, Member Murdock was of the view that a union is to be treated as an employer only when the employment relates to performance of a non-union function.

[8] See Senate Report No. 1184 on S. 2926, 73rd Cong., 2d Sess., p. 4, 1 Leg. Hist. (1935) 1102.

[9] 1 Leg. Hist. (1935) 2.

a number of witnesses criticized the exclusion of unions from the definition of employer, stating that it was unfair to treat unions, when acting as employers of their own employees, differently from other employers.[10] Although two of the critics, in voicing their objections, referred to the fact that unions enter into all sorts of businesses,[11] none of the critics indicated any desire to include labor organizations within the definition of employer only when they engage in commercial ventures. And the 1934 Senate Labor Committee Report, in explaining the insertion of the parenthetical words "(other than when acting as an employer)" after the language excluding labor organizations from the definition of employer in the final version of the bill, stated:[12]

> The reason for stating that "employer" excludes "any labor organization, other than when acting as an employer" is this: *In one sense every labor organization is an employer, it hires clerks, secretaries, and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides.* But in relation to other employees it ought not to be treated as an employer, and ought to have the right to use lawful means to induce employees to join the organization. [Emphasis added.]

Congress did not act upon the 1934 bill. In 1935, a new bill, S. 1958, was introduced by Senator Wagner.

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[10] 1 Leg. Hist. (1935) 494, 689–690, 720, 790–791, 940, 989, 2 Leg. Hist. (1935) 1990.

[11] Leg. Hist. (1935) 720, 940.

[12] Senate Report No. 1184, 73rd Cong., 2d Sess., May 26, 1934, accompanying S. 2926, p. 4 (1 Leg. Hist. (1935) 1102).

It again contained a blanket exclusion of labor organizations from the definition of employer, omitting the parenthetical language proposed by the Senate Labor Committee in 1934. That language, however, was restored by the Committee in the new bill as reported by it and was retained without change in the bill which was finally enacted in 1935, as well as in the 1947 amendments. Explaining the restoration of this language in the bill, the Senate Committee Report on S. 1958 stated:[12]

> The term "employer" excludes labor organizations, their officers, and agents (except in the extreme case when they are acting as employers in relation to their own employees). Otherwise the provisions of the bill which prevent employers from participating in the organizational activities of workers would extend to labor unions as well, and thus would deprive unions of one of their normal functions.

Board Member Murdock construed the above language from the Senate Committee Report to mean that "Congress did not intend either in the Wagner Act or the Taft-Hartley Act, to regulate relations between unions and such employees as they utilize in their normal collective bargaining activities" (R. 236a). In his view, the exclusion of unions from the definition of employer except, as the Report stated, "in the extreme case when they are acting as employers in relation to their own employees," must mean that unions are not to be treated as employers when employing help merely to carry out their col-

[12] Senate Report No. 573, 74th Cong., 1st Sess., May 2, 1935, accompanying S. 1958 (2 Leg. Hist. (1935) 2305).

lective bargaining functions. Practically all unions, he reasoned, employ some office or clerical help, organizers and bargaining agents, and these situations cannot be considered the "extreme case[s]" Congress had in mind. Extreme cases exist, Mr. Murdock stated, only "where unions have departed from their traditional role and embarked on commercial enterprises—banks for example—where they have employees in the same context as any other industrial employer" (R. 238a). Mr. Murdock also stated that he was fortified in this view by the fact that the Wagner Act was intended to regulate employers in the interest of employees and unions, not to regulate unions as well, and that the Taft-Hartley Act left intact that portion of Section 2 (2) here in issue and accomplished its purpose to regulate unions by adding Section 8 (b) to the Act (*ibid.*).

But it cannot be overlooked that the history of Section 2 (2) goes back to the 1934 Wagner Bill which, like the 1935 bill, was amended to exclude from the definition of employer "any labor organization (other than when acting as an employer)."[14] That legislative history contradicts the notion that unions were to be considered as employers only when engaging in some commercial venture. The Senate Report on the 1934 bill, as already shown, expressly states that "[i]n one sense," *vis-a-vis* "clerks, secretaries, and the like", every labor organization is an employer and that "[i]n its relations with its own

[14] Although the two bills were considered by different Congresses, the composition of the Senate Committee in 1935 was substantially the same as that of the 1934 Committee (cf. 1 Leg. Hist. (1935) 28 (II) and 1 Leg. Hist. (1935) 1374 (II)).

employees, a labor organization ought to be treated as an employer, and the bill so provides."

The excerpt from the 1935 Senate Report does not detract from this conclusion. It shows on its face that the purpose of Congress in providing that the term "employer" shall not include any labor organization "other than when acting as an employer" was to permit labor organizations to carry on their normal organizing activities among employees of other employers without running afoul of the Section 8 (a) (1) and (2) proscriptions of the statute, which make it an unfair labor practice for an employer to participate in the organizational activities of workers. This purpose is manifested even more clearly in the legislative history of the 1934 bill, S. 2926. In these circumstances, the somewhat ambiguous reference in the Senate Committee Report on the 1935 Wagner bill to "the extreme case[s]" where labor organizations are acting as employers would seem to indicate no more than that the Committee was aware of the fact that, except in rare instances, a union's organizational attempts are addressed to employees of other employers, not to their own employees. Accordingly, we think that the Board correctly refused to read the Committee report on the Wagner Act as qualifying the explicit terminology of Section 2 (2).[15]

[15] Nothing in the legislative history of the 1947 amendments to the Act casts any doubt upon this reading of the statute. Nor does the specification in Section 8 (b) of the amended Act of unfair labor practices by unions imply that labor organizations, in their normal functions, are not employers within the meaning of the Act. Section 8 (b) merely specifies unfair labor practices with respect to the employees of other employers for which labor organizations are held accountable.

II

THE ACT, HOWEVER, DOES NOT REQUIRE THE BOARD TO ASSERT ITS JURISDICTION OVER LABOR ORGANIZATIONS ACTING AS EMPLOYERS

Petitioner asserts initially (Br. 11–22) that, in view of the specific inclusion of unions (when acting as employers) within the statutory definition of the term "employer," the Board is compelled, as a matter of law, to assert its jurisdiction, provided that the requirement as to commerce is satisfied. But the Board "as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265. The statute, instead of conferring "private rights," grants only rights "in the interest of the public" to be protected by "a public procedure, looking only to public ends." *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 150–151 (C. A. 5). The statute vests the agency with exclusive primary jurisdiction to protect these rights and "to give effect to the declared public policy of the Act." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362. In order to permit the Board to administer the provisions of the Act so as to give effect to its declared public policy, Congress "reposed in the Board complete discretionary power to determine in each case whether the public interest requires it to act." *National Labor Relations Board* v. *Newark*

Morning Ledger Co., 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693. To that end, the Act "empowers" the Board, as provided therein, to prevent any person from engaging in the proscribed unfair labor practices. Section 10 (a).

As this Court recognized in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647–648, "unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns." [16] Proceeding, prior to 1950, on a case-to-case basis, and since that time pursuant to general standards which it has established and periodically revised,[17] the Board has declined jurisdiction in numerous cases on the theory "that it better effectuates the purposes of the Act, and promotes the prompt

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[16] See, also, *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C. A. 9), certiorari denied, 341 U. S. 909; *Hotel Employees Local No. 255* v. *Leedom*, Civil Action No. 134–56 (U. S. Dist. Ct., D. C.), decided January 8, 1957; *Task Force Report on Regulatory Commissions* (Appendix N), prepared for the Commission on Organization of the Executive Branch of the Government (G. P. O. 1949), 21–22, 41, 138.

[17] See Sixteenth Annual Report of the National Labor Relations Board (G. P. O. 1952), pp. 15–16, 20–39; Seventeenth Annual Report (G. P. O. 1953), pp. 9, 12–21; Nineteenth Annual Report (G. P. O. 1955), pp. 2–5. The establishment by the Board of these general standards followed hearings in which Congress was advised of the Board's declination of jurisdiction in many instances, but on a case by case basis and an admonition by Senator Taft that the Board should "make some declaration of policy" in this respect. *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., 40; *Report of the Joint Committee on Labor-Management Relations*, S. Rep. 986, Part 3, 80th Cong., 2d Sess., 11–15; S. Rep. 99, 81st Cong., 1st Sess., 40; H. Rep. 1852, 81st Cong., 2d Sess., 10; *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., 175–176, 177, 1024–1025, 1286–1287.

handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce" (*Breeding Transfer Company*, 110 NLRB 493–495), as well as for a variety of other reasons.[18] If the Board concludes that the policies of the Act would be better effectuated by declining to assert its statutory jurisdiction, it may refuse to issue a complaint.[19] It may also dismiss a complaint which has already issued without determin-

[18] E. g., *Godchaux Sugars, Inc.*, 12 NLRB 568, 576–579 (union had agreed not to press charges if employer would agree to an election); *Consolidated Aircraft Corp.*, 47 NLRB 694, 706–707 (failure of parties to exhaust arbitration procedures of their contract); *Allis-Chalmers Mfg. Co.*, 72 NLRB 855 (execution of contract rendered affirmative order unnecessary).

[19] *National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 18–19; *Progressive Mine Workers* v. *National Labor Relations Board*, 3 Labor Cases, par. 60133 (C. A. D. C.); *White* v. *National Labor Relations Board*, 9 LRRM 657 (C. A. D. C.); *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), certiorari denied, 341 U. S. 950; *National Labor Relations Board* v. *Concrete Haulers*, 215 F. 2d 959 (C. A. 5), denying motion to modify decree; *National Labor Relations Board* v. *Barrett Company*, 120 F. 2d 583, 586 (C. A. 7); *National Labor Relations Board* v. *National Broadcasting Company*, 150 F. 2d 895, 899 (C. A. 2); *Anthony* v. *National Labor Relations Board*, 132 F. 2d 620, 621 (C. A. 9); *National Labor Relations Board* v. *General Motors Corp.*, 116 F. 2d 306, 312 (C. A. 7); *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C. A. 1); *General Drivers, Chauffeurs, and Helpers* v. *National Labor Relations Board*, 179 F. 2d 492, 494–495 (C. A. 10); *Wilke* v. *National Labor Relations Board*, 15 Labor Cases, par. 64798 (C. A. 4).

ing the merits of the case,[20] subject to the limitation that its action must not be arbitrary or capricious.[21] As this Court, noting the Board's practice, has stated: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 684.

This discretionary exercise by the Board of its jurisdiction is authorized by Section 10 (*infra*, p. 43). Under Section 10 (a), the Board "is empowered," but not directed, "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce," and under Section 10 (b) it has

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[20] *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 684; *National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 19; *Optical Workers' Union Local 24859, et al.* v. *National Labor Relations Board*, 227 F. 2d 687 (C. A. 5), certiorari denied, 351 U. S. 963; *National Labor Relations Board* v. *Federal Engineering Co.*, 153 F. 2d 233, 234 (C. A. 6); *Local Union No. 12* v. *National Labor Relations Board*, 189 F. 2d 1, 4–5 (C. A. 7), certiorari denied, 342 U. S. 868; *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 420–422 (C. A. 9), certiorari denied, 342 U. S. 815; *Teamsters, etc., Local 183* v. *National Labor Relations Board* (C. A. 9), decided June 14, 1956, 38 LRRM 2305; see *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 776, and separate opinion of Frankfurter, J., at 778.

[21] *Pedersen* v. *National Labor Relations Board*, 234 F. 2d 417 419 (C. A. 2); *Joliet Contractors Ass'n.* v. *National Labor Relations Board*, 193 F. 2d 833, 844 (C. A. 7).

"power," but is not directed, to issue complaints and conduct hearings."

Petitioner's argument that Section 2 (2) of the Act compels the Board to assert its jurisdiction over labor organizations acting as employers overlooks the fact that it is Section 10, not Section 2 (2) of the statute, which confers upon the Board its authority to assert or decline jurisdiction in unfair labor practice cases. Section 2 (2) purports merely to define the term "employer." That section does not constitute a mandate that the Board must assert its jurisdiction over labor organizations as employers, as distinguished from other employers included within the definition of the term "employer." It simply puts labor organizations, viewed in relation to their own employees, in the broad category of employers; as the court below held, "it did no more than that" (R. 264).

Nor does the legislative history of Section 2 (2) suggest a congressional purpose to treat labor unions differently from other employers. If anything, it shows that Congress intended that they be treated the same. As pointed out *supra*, pp. 17–19, the original versions of both the 1934 and 1935 Wagner bills excluded labor organizations altogether from the definition of employer. Witnesses who appeared before the Senate Committee on Education and Labor in

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" In this connection, it is also significant that even where the Board has exercised its jurisdiction and found that unfair labor practices have been committed, the Act vests the Board with a broad discretion to determine what remedy would effectuate the statutory policies. Section 10 (c). And the statute also leaves it to the Board's discretion whether or not to seek enforcement of its unfair labor practice orders in the courts. Section 10 (e).

1934 in opposition to this proposed exclusion urged that "the same restrictions put upon management should also be put upon labor organizations", and they characterized the exclusion as "unfair."[25] The insertion in the final versions of both the 1934 and 1935 bills of the parenthetical words "other than when acting as an employer" was apparently made in response to critics who argued that labor-union employers should be treated the same as other employers—not differently, as petitioner contends.

Petitioner further asserts (Br. 20) that, even assuming that the Board might decline jurisdiction over unions whose operations as employers have a "meager" effect upon commerce, it may not adopt an administrative standard which would result in a declination of jurisdiction over labor-union employers as a class. But the Board's declination of jurisdiction over such employers relates only to the traditional, noncommercial aspect of their operations.[26]

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[25] Statement of Leslie Vickers, Economist, American Transit Association, at Hearings before the Committee on Education and Labor, United States Senate, 73rd Cong., 2d Sess., on S. 2926, p. 682 (1 Leg. Hist. (1935) 720). In similar vein, see statements of other witnesses. Hearings, *id.*, pp. 460, 651–652, 752–753, 902, 951; Hearings, 74th Cong., 1st Sess., on S. 1958, p. 604 (1 Leg. Hist. (1935) 494, 689–690, 790–791, 940, 989; 2 Leg. Hist. (1935) 1990).

[26] The Board has, however, declined to assert jurisdiction over whole classes of employers—such as taxicab companies and hotels—chiefly because the operations of such employers, although affecting commerce in the statutory sense, are by their nature essentially local entities. *Checker Cab Co.*, 110 NLRB 683; *Hotel Association of St. Louis*, 92 NLRB 1388. Its right to decline jurisdiction over the hotel industry has recently been upheld in *Hotel Employees Local No. 255* v. *Leedom*, Civil Action No. 134–56 (U. S. Dist. Ct., D. C.), decided January 8, 1957.

Petitioner suggests (Br. 20–21) that unions, as such, do not engage in commercial enterprises and that the Board's declination of jurisdiction over unions acting as employers in the course of their traditional functions would be tantamount to reading labor organizations out of the statutory definition of employers, in diresgard of the congressional purpose. But the fact is that unions do engage extensively in various commercial activities and that Congress was so advised prior to the enactment of the Wagner Act. Presumably it was, at least in part, because of these representations that Congress decided not to exclude them from the statutory definition of the term "employer." Leslie Vickers, representing the American Transit Association, told the Senate Committee on Education and Labor, in opposing the exclusion of unions from the definition of employer, that the "history of labor organizations becoming rich and powerful and entering into business is too recent to disregard * * *. Under the exclusion as now contained in the bill it is entirely conceivable that labor organizations in themselves will displace industrial organizations, and if and when they do they will not be required under the language of this exclusion to comply with the provisions of this act." Hearings before the Committee on Education and Labor, U. S. Senate, 73rd Cong., 2d Sess., on S. 2926, p. 682 (1 Leg. Hist. (1935) 720). In similar vein, Dr. Gus W. Dyer, professor of economics, Vanderbilt University, assured the Committee that "[l]abor organizations may employ an unlimited number of workers to engage in all sorts of

business activities." Hearings, *id.*, p. 902 (1 Leg. Hist. (1935) 940).

Although it is rare that unions directly operate commercial businesses, it is undisputed that they exercise control—generally, through stock ownership—over many kinds of incorporated businesses—radio stations, daily newspapers, banks, insurance companies, office buildings, real estate developments, laundries, cigar making, clothing manufacturing, shoemaking, fruit processing, the sale of sundry supplies to United States merchant ships, etc.[28] The fact that they

[28] Nathan Belfer, "Trade Union Investment Policies," *Industrial and Labor Relations Review*, *Vol.* 6 (April 1953, pp. 338–342, 343, 345–346; Hardman and Neufeld, *The House of Labor* (N. Y. 1951), pp. 327–328; Peterson's *American Labor Unions* (N. Y. London, 1945), pp. 176–179; Millis and Montgomery, *Organized Labor* (1945), pp. 344–352; *Business Week*, January 1, 1955, p. 56, April 18, 1953, p. 172, and March 29, 1952, p. 179; *Nation's Business*, July 1955, pp. 46, 49–50; *U. S. News & World Report*, Vol. 38 (February 11, 1955), pp. 101–104, Vol. 37 (August 6, 1954), pp. 78–80, Vol. 28 (March 31, 1950), pp. 41–42; *Fortune*, Vol. 38 (December 1948), pp. 200–201; *Sales Management*, Vol. 61 (September 1, 1948), pp. 119–121; *The National Underwriter* (National Weekly Newspaper of Fire and Casualty Insurance Co.), July 21, 1955, p. 1; U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review* Vol. 77 (September, 1954), pp. 1014–1015. President's Supplemental Report, *Proceedings of the Twenty-first Biennial and Sixty-first Convention of the Bricklayers, Masons and Plasterers' International Union of America* (October 1952), pp. 31–32; *Reports of Officers to the Thirty-fourth Convention of the International Printing Pressmen and Assistants' Union of North America* (August 1948), p. 17; *Summary of Proceedings Including Report of the Officers to the 27th U. I. U. Convention of the Upholsterers' International Union of North America* (June 4–12, 1953, New York City, N. Y.), p. 70; *AFL–CIO News*, Vol. II, No. 2 (January 12, 1957), p. 7; President's Report, *Fourteenth Biannual Convention of the International Airline Pilots Association, Chicago, Ill.* (November 5 to 9, 1956), p. 16.

ordinarily operate these businesses through a corporate structure does not mean that they cannot be reached by the Board as employers of the corporations' employees. Section 2 (2) includes within the definition of employer "any person acting as an agent of an employer, directly or indirectly," and the Board has consistently followed a policy of holding liable, *as employers,* individuals or organizations other than the direct employer where their relation to the latter, either as an agent or as a controlling entity, is such that their conduct interfered with the rights guaranteed employees under the Act.[26] In other situations

[26] E. g., *Bethlehem Steel Corporation*, 14 NLRB 539, enforced, 120 F. 2d 641, 650 (C. A. D. C.), and *Condenser Corp.*, 22 NLRB 347, 361–362, enforced, 128 F. 2d 67, 71 (C. A. 3) where the parent corporation, which was sole stockholder of the direct employer, was held liable as an employer of the subsidiary's employees; *Holtville Ice & Cold Storage Co.*, 51 NLRB 596, 603, 614, enforced, 148 F. 2d 168, 170 (C. A. 9), where a farmers' association and its manager who acted in the interest of the direct employer were similarly held responsible; *Blue Ridge Shirt Manufacturing Co. and Fayetteville & Lincoln County Chamber of Commerce*, 70 NLRB 741, 742–743, enforced without opposition, 177 F. 2d 202 (C. A. 6), where a Chamber of Commerce was held liable; *Taylor-Colquitt Co.*, 47 NLRB 225, 240–243, enforced, 140 F. 2d 92, 93 (C. A. 4), where the wife of the leading foreman of the company was held to be a Section 2 (2) employer; *Russell Mfg. Co.*, 82 NLRB 1081, 1084–1085, where the Board made a similar finding as to police officers who assisted the direct employer, enforcement denied on evidentiary grounds, 187 F. 2d 296, 297–298 (C. A. 5); *Salant & Salant*, 66 NLRB 24, 38, 44, 45, where the Board made a similar finding as to a citizens' committee, enforcement denied on grounds that their activities were protected by Section 8 (c) of the Act, enforced as amended, 183 F. 2d 462, 465 (C. A. 6).

as well, the Board has not hesitated to look through the corporate veil in order to assess responsibility."

Accordingly, a Board decision not to assert jurisdiction over a labor organization acting as an employer in relation to persons hired to assist it in performing its functions as a union does not mean that the Board is declining to assert jurisdiction over labor-union employers as a class. To be sure, the Board has rarely had occasion to decide a case involving a labor-union employer. The instant case is the first in the Board's 20-year history in which it has been called upon to decide whether such an employer, acting in a noncommercial capacity, has engaged in unfair labor practices (R. 230a). And only once, in *Air Line Pilots Association,* 97 NLRB 929 (which the Board in this case expressly overruled insofar as it might be inconsistent), has the Board had occasion to decide a representation case involving a labor-union employer acting in such a noncommercial capacity

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" *In Bausch & Lomb Optical Co.*, 108 NLRB 1555, for example, the Board relieved the employer of his obligation to bargain with a union chosen by his employees because that union had set up a corporation, substantially all of whose shares were owned by the union members, to engage in a business in competition with the respondent employer. And in *Guayama Bakers*, 27 LRRM 1322, the trial examiner dismissed an allegation that the employer had discriminatorily discharged the union's president because the union had established a rival baking business. Cf. *United States* v. *Seafarers Sea Chest Corp. and Seafarers' International Union of North America, Atlantic and Gulf District*, Civil Action No. 14,674 (D. C. E. D. N. Y.), in which a consent judgment in an antitrust suit was entered on March 20, 1956, against both the union and a corporation which it had set up to furnish sundry supplies to United States merchant ships.

(R. 235a, n. 7).[28] Moreover, in only one case has the Board found that a labor-union employer engaged in a commercial enterprise has violated Section 8 (a) provisions of the Act. *Otter Trawlers Union, Local 53,* 100 NLRB 1187, 1188, 1195–1198.[29] Also, in only a few instances, such as *Bausch & Lomb* and *Guayama Bakers, supra,* have the commercial activities of labor-union employers been a major factor in the disposition of a case. The fact, however, that proceedings before the Board only infrequently involve labor-union employers hardly supports the notion that the statute should be construed to deprive the Board of discretion in such cases.

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[28] In that non-adversary proceeding, the Board held that, although the Association was not a labor organization within the meaning of the Act since it represented employees who were subject to the Railway Labor Act, it was a labor union in the generally accepted sense and was an employer within the meaning of the statute. While recognizing that no standards had yet been set for testing the Board's jurisdiction in such cases, the Board nevertheless concluded: "As the Board normally assumes jurisdiction over enterprises which are multi-state in character, and as no valid reason has been advanced for applying a different standard here, we find that the Employer is engaged in commerce within the meaning of the Act, and that it would effectuate the policies of the Act to assert jurisdiction" (*id.* at 930).

[29] There, the Board, adopting the trial examiner's intermediate report (to which no exceptions had been filed in this respect), found that a union which had as members the captains and owners of fishing vessels, as well as the latter's crewmen, was a statutory employer of those crewmen, "for Section 2 (2) of the Act states, in part, 'the term "employer" includes any person *acting as an agent* of an employer, directly or indirectly' " (*id.* at 1195). It asserted jurisdiction on the basis of the effect on commerce of the fishing business of the vessel owners.

III

THE BOARD, IN THE EXERCISE OF ITS DISCRETION, MAY APPLY TO LABOR ORGANIZATIONS, ACTING AS EMPLOYERS IN THE COURSE OF PERFORMING THEIR TRADITIONAL FUNCTIONS, THE SAME STANDARDS WHICH IT APPLIES TO OTHER NONPROFIT, NONCOMMERCIAL VENTURES

Petitioners final claim (Br. 23–28) is that, in any event, the Board abuses its discretionary authority if it applies to labor-union employers, performing their normal functions, the same jurisdictional standards which it has adopted and applied to other nonprofit organizations.

Section 2 (2), before its amendment in 1947, excluded from the definition of employer only "the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." As amended and passed by the House in 1947, Section 2 (2) provided, in conformity with similar exclusions from the Federal income tax and payroll tax laws (26 U. S. C., Supp. III, Sections 501 (c) (3) and 3306 (c) (8)), that the following also be excluded: "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual" (H. R. 3020, 80th Cong., 1st Sess., pp. 3–4 (1 Leg. Hist. (1947)

158, 160–161)).[20] The Senate version of the proposed amendment of Section 2 (2), as originally reported, contained no exemption of the type added in the House bill. S. 1126 (Report No. 105), 80th Cong., 1st Sess., p. 4 (1 Leg. Hist. (1947) 102). During the debate on the Senate bill, Senator Tydings offered, and the Senate accepted, an amendment excluding from the definition of "employer" "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" (93 Cong. Rec. 4997 (2 Leg. Hist. (1947) 1464–1465)).[21]

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[20] The House Report explains this exemption as follows:

"Churches, hospitals, schools, colleges, and societies for the care of the needy are not engaged in 'commerce' and certainly not in interstate commerce. These institutions frequently assist local governments in carrying out their essential functions, and for this reason should be subject to exclusive local jurisdiction. The bill therefore excludes from the definition of 'employer' institutions that qualify as charities under our tax laws. In this respect, the bill is consistent with similar laws in a number of States, notably New York, Pennsylvania, and Wisconsin. The bill does not exclude from the definition institutions organized for profit or those a substantial part of whose activities is carrying on propaganda or attempting to influence legislation" (House Report No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 12 (1 Leg. Hist. (1947) 303)).

In criticizing the bill, the House Minority Report stated: "While the Board has, generally speaking, not taken jurisdiction of such enterprises, this proposal would exclude from the coverage of the act organizations which, for example, conduct a large insurance business as was the case in *Polish National Alliance* v. *N. L. R. B.* (322 U. S. 643)." House Minority Report, p. 68 (1 Leg. Hist. (1947) 359).

[21] During the hearings before the Senate Committee on Labor and Public Welfare, statements were made by the president of the American Hospital Association and by the president of the Board of Trustees, Johns Hopkins Hospital, opposing the inclusion of nonprofit charitable hospitals within the coverage of the Act and

The Act, as finally passed, adopted the Senate amendment. The Conference Report on the Act, in explanation of the adoption of that amendment, states:[32]

> The conference agreement follows the * * * Senate amendment in the matter of exclusion of nonprofit corporations and associations operating hospitals. The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.[33]

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the attention of the Committee was called to the fact that the Board had theretofore asserted jurisdiction over a nonprofit charitable hospital in the District of Columbia. *Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., Part 4, 2181–2184, 2241–2243. The Board had theretofore, in 1943, asserted jurisdiction over a hospital in the District of Columbia which had been incorporated as a nonprofit charitable institution and its right to do so was expressly upheld in *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852, 853 (C. A. D. C.), certiorari denied, 324 U. S. 847, enforcing 50 NLRB 393.

[32] H. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 32 (1 Leg. Hist. (1947) 536). This explanation is almost identical with that given by Senator Taft on the floor of the Senate when urging the passage of the provision approved in the Conference Report. 93 Cong. Rec. 6441 (2 Leg. Hist. (1947) 1536).

[33] Actually, when the Board found that the interstate commercial transactions of these nonprofit organizations were substantial, it asserted jurisdiction. *Christian Board of Publication*, 13 NLRB 534, 537; *American Medical Association*, 39 NLRB 385, 386–387; *Polish National Alliance*, 42 NLRB 1375, 1380; *Central Dispensary & Emergency Host*, 50 NLRB 393,

It would seem clear that Congress, in its discussion of the matter, was not purporting to make a comprehensive and exclusive listing of all nonprofit organizations over which the Board might properly decline to assert jurisdiction. Congress left that task to the Board, noting at the same time, for the Board's guidance in the future, its general approval of the Board's abstention from exercising its statutory jurisdiction over nonprofit employers save in the exceptional circumstances noted above. As the Board stated in *The Trustees of Columbia University*, 97 NLRB 424, 427, "Regardless of whether or not the conference report literally recites the Board's practice prior to the amendment of the Act [see n. 33, *supra*], it does indicate approval of and reliance upon the Board's asserting jurisdiction over nonprofit organizations 'only in exceptional circumstances and in connection with purely commercial activities of such organizations.' Whether or not this language provides a mandate, it certainly provides a guide."

Accordingly, subsequent to the enactment of the Taft-Hartley Act, as before, the Board followed a policy of declining jurisdiction over nonprofit organizations which are not substantially engaged in activities considered "commercial in the generally accepted sense," even though the organization's activities "affect commerce sufficiently to satisfy the requirements of the statute and the standards estab-

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395–396; and *Henry Ford Trade School*, 58 NLRB 1535, 1536–1537. When those transactions were not substantial, it found that the policies of the Act would not be effectuated by the assertion of jurisdiction. *Hyde Park Cooperative Society*, 73 NLRB 1254.

lished by the Board for the normal exercise of its jurisdiction * * *." *Trustees of Columbia University*, 97 NLRB 424, 425.[34] The effect on commerce of the noncommercial activities of such organizations is considered by the Board as "too remote" to warrant its exercise of jurisdiction. *Philadelphia Orchestra Association*, 97 NLRB 548, 549. On the other hand, pursuant to its policy of asserting jurisdiction only over those "enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce" (*Hollow Tree Lumber Co.*, 91 NLRB 635, 636), the Board has asserted jurisdiction over nonprofit organizations, a substantial part of whose activities are conducted on a commercial basis.[35]

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[34] That case involved the employees of the libraries of Columbia University. See, also, *Philadelphia Orchestra Association*, 97 NLRB 548, involving the employees of a nonprofit symphony orchestra; *Lutheran Church, Missouri Synod*, 109 NLRB 859, involving employees of a radio station operated on a noncommercial basis for the benefit of a church; and *Armour Research Foundation of Illinois Institute of Technology*, 107 NLRB 1052, involving employees engaged in technical research operations which were, for the most part, noncommercial in nature.

[35] *Illinois Institute of Technology*, 81 NLRB 201 (whose technical research was industrially sponsored); *General Electric Company*, 89 NLRB 1247 (whose operation of a nonprofit hospital was intimately related to its operation of a plutonium manufacturing plant); *Port Arthur College*, 92 NLRB 152 (radio station owned and operated by a nonprofit educational institution was operated on a commercial basis for profit); *Oklahoma State Union of Farmers' Educational and Cooperative Union of America*, 92 NLRB 248 (nonprofit marketing cooperative's operations were commercial in nature); *Sunday School Board of the Southern Baptist Convention*, 92 NLRB 801 (nonprofit religious corporation engaged, *inter alia*, in publication and sale of religious literature); *Bemis Brothers Bag Co.*, 95 NLRB 44, and *Olin Industries*,

At the time of the enactment of the 1947 amendments, the Board had not yet had occasion to pass on the question whether it should assert jurisdiction over labor-union employers and other types of nonprofit organizations not specifically mentioned in the legislative history.[28] When the instant case came before it for decision, the Board issued a notice that it would hear oral argument, informing the parties that the Board was primarily interested in "the legal and policy considerations" bearing upon its assertion of jurisdiction. Before the Board questions were raised, *inter alia,* as to whether, in determining the effect on commerce of the operations of the Teamster organizations as employers, the business activities of the employers with whom they dealt as unions should be considered controlling; whether the Teamster organizations should be treated for jurisdictional purposes the same as commercial employers engaged in multi-

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97 NLRB 130 (nonprofit voluntary associations organized and operated by commercial employers for purpose of furnishing recreational and other facilities to their employees); *Kennecott Copper Corp.*, 99 NLRB 748 (nonprofit hospital and dispensary operated by corporation for sole benefit of its mining employees); *California Institute of Technology*, 102 NLRB 1402 (nonprofit educational institution operated, among other research projects, a huge wind tunnel sponsored and used by five industrial aircraft companies); *Massachusetts Institute of Technology*, 110 NLRB 1611 (nonprofit educational institution engaged, *inter alia*, in huge research project for Department of Defense); *Disabled American Veterans, Inc.* (*Idento Tag Operation*), 112 NLRB 864 (nonprofit veterans' association engaged in assembly and distribution of miniature license indentification tags to car owners).

[28] E. g., *Philadelphia Orchestra Association*, 97 NLRB 548, 549 (nonprofit symphony orchestra over which the Board declined jurisdiction).

state enterprise; whether the nonprofit character of these organizations, either as a matter of law or of policy, should prompt the Board to decline jurisdiction; and whether—as in *Bausch & Lomb Optical Co.*, 108 NLRB 1555[37]—the competitive interests of the charging union and the Teamster unions in organizing the employees of the latter, should cause the Board, as a matter of policy, to dismiss the complaint. The many policy considerations discussed before the Board not only point up the difficult problems with which the Board was faced, but suggest that no single view may be deemed the only reasonable one on the question whether it would effectuate the policies of the Act for the Board to assert jurisdiction.

The view that it would not effectuate the policies of the Act to assert jurisdiction over the Teamster organizations because their activities were "not substantial engagement in a commercial venture within the contemplation of the Board's jurisdictional principles for nonprofit employers" (R. 234a), is, we submit, neither arbitrary nor unreasonable. The Board had already decided in a number of cases that it would not assert jurisdiction over nonprofit organizations unless such organizations engaged in commercial businesses. The application of this standard in the instant case was based on the fact that the activities of all the Teamster organizations involved are nonprofit and noncommercial in nature. None is engaged in business or conducts a commercial enter-

[37] In that case, as already noted, the Board, for policy reasons, dismissed a complaint against an optical company charging it with an unlawful refusal to bargain with a union which had set up a rival optical company to compete with the respondent company.

prise in the ordinary sense. Instead, the basic purpose of each is to provide benefits for Teamster members and to advance the cause of employees generally.

Thus, the International, the Joint Council and locals seek to improve working conditions, increase job security, and promote employee welfare by engaging in the usual activities of labor organizations. Although the 872 locals throughout the country (only two of which are involved in this case) transmit to the International in Washington, D. C., membership fees and per capita taxes totaling several million dollars annually, this is obviously not a business operation in the generally accepted sense."[8] The Building Association operates an office building not as a commercial enterprise in the usual sense, but in order to provide office space at the lowest possible cost for various Teamster organizations who are its only tenants. It has virtually no interstate inflow or outflow of funds and none of the locals which are its incorporators is engaged in any commercial enterprise."[9] The Security Plan Office is a fiduciary engaged

[8] Local 206, one of two locals involved herein, in the fiscal year ending June 30, 1954, transmitted $46,786 to the International (R. 86a). The other, Local 223, transmitted $7,258 (*ibid.*). Only $8,609 of the revenue of the Joint Council came from outside the State of Oregon (*ibid.*).

[9] As pointed out in the Farmer-Peterson opinion (R. 235a, n. 6), if the Building Association were to be considered as standing alone, it does not meet the Board's jurisdictional standard for an employer operating an office building. See *McKinney Avenue Realty Company (City National Bank)*, 110 NLRB 547, in which the Board ruled that it would assert jurisdiction over the operator of a building only if he is otherwise engaged in commerce and uses the building to house his own offices.

in administering thrust funds established under collective bargaining agreements, a typical labor union function in the furtherance of employee welfare. Unlike the fraternal organizations involved in *Polish National Alliance*, 42 NLRB 1375, enforced, 136 F. 2d 175 (C. A. 7), affirmed, 322 U. S. 643, and *Knights of Columbus*, 1–RC–3913 (1955) (unreported), over which the Board asserted jurisdiction, the Security Plan Office merely purchases and pays premiums on insurance policies and processes and pays claims arising under them. It does not operate an insurance business as do the typical fraternal organizations. Accordingly, since the Teamster organizations are nonprofit employers and were not substantially engaged in any commercial venture in this case, the Board, we think, can appropriately treat them as it would any other nonprofit, noncommercial employer in deciding whether to assert its jurisdiction.

CONCLUSION

We respectfully submit that the judgment of the court below is correct.

However, as already indicated, only two of the five Board members found that it would not effectuate the policies of the Act to assert jurisdiction in this case. In these circumstances, if this Court agrees that the Teamster organizations are employers within the meaning of the Act, the Court may deem it appropriate at this time to defer ruling upon the issues

raised by the petition and to remand the case to the Board for further consideration.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *